BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of Power Holdings of Illinois, LLC	)	PSD Appeal No. 09-04
	)	Permit No. 081801AAF (Illinois)

SIERRA CLUB's RESPONSE TO SUR-REPLY OF THE STATE OF ILLINOIS

On April 26, 2010, the Board issued an Order Allowing Additional Response, Doc. # 53 ("Order"), which found that the Illinois Environmental Protection Agency ("IEPA") raised an argument for the first time in its sur-reply brief and provides that the Sierra Club may file a response to that new argument by May 10, 2010. Order, at 2. Specifically, the Board notes that IEPA argues for the first time in its sur-reply that an Illinois statute, 415 ILCS 140/15, "prohibits IEPA from imposing any enforceable permit limits on greenhouse gas emissions 'unless required to do so by an act of Congress or the United States Senate ratifies the Kyoto Protocol'" and that, therefore, 35 Ill. Admin. Code § 201.141 "cannot be read as requiring control of greenhouse gases." Order at 2, quoting Illinois Sur-reply at 6. Sierra Club respectfully submits this response to the issue identified in the Board's Order.

Argument

IEPA's argument assumes that: (1) 35 Ill. Admin. Code § 201.141 is a state law that can be limited or changed by the state; (2) the Illinois legislature modified or limited 35 Ill. Admin. Code § 201.141 through 415 ILCS 140; and (3) that 415 ILCS 140 prohibits the

previously-promulgated 35 Ill. Admin. Code § 201.141 from being applied to greenhouse gases. IEPA Sur-reply at 6-7. None of these assumptions is correct. Therefore, IEPA's argument must be rejected.

A. 35 Ill. Admin. Code § 201.141 Is Federal Law.

IEPA's implicit premise, that 35 Ill. Admin. Code § 201.141 is state law and therefore subject to revocation or limitation by other state law, is incorrect. There is no dispute that 35 Ill. Admin. Code § 201.141 is a federally-approved Illinois SIP provision. 37 Fed. Reg. 10862 (May 31, 1972); *see also* PHIL Resp. at 41 ("The Illinois SIP incorporates the Illinois General Permitting regulations in Part 201, including Section 201.141…")). As such, it has the full force and effect of federal law. *See Trustees for Alaska v. Fink*, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994) ("Having 'the force and effect of federal law,' the EPA-approved and promulgated Alaska SIP is enforceable in federal courts.") (quoting Union Electric Co. v. E.P.A., 515 F.2d 206, 211 & n.17 (8th Cir. 1975), *aff'd,* 427 U.S. 246, 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976)); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989) ("If a state implementation plan … is approved by the EPA, its requirements become federal law and are fully enforceable in federal court."); *Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 721-722 (E.D. Pa. 2002); *Communities for a Better Environment v. Cenco Refining Co.*, 180 F. Supp. 2d 1062, 1068 (C.D. Cal. 2001) ("Once approved by the EPA, the requirements and commitments of a SIP become binding as a matter of federal law upon the state.").

B. The Illinois Legislature Cannot Unilaterally Modify an Approved SIP.

It is indisputable that Illinois Legislature cannot enact a statute, such as 415 ILCS 140, which conflicts with federal law, including Illinois' approved SIP. U.S. Const. Article VI, Clause 2 ("… the Laws of the United States … shall be the supreme Law of the Land… any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); 42 U.S.C. § 7416 ("…if an emission standard or limitation is in effect under an applicable implementation plan… such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."); *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) ("The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, any thing in the constitution or laws of any State to the contrary notwithstanding."). Therefore, because 35 Ill. Admin. Code § 201.141 prohibits emissions of any "contaminant" in concentrations that, when added to contaminants emitted from other sources, "cause or tend to cause air pollution" as defined in the regulations, because greenhouse gases fit easily within the definition of a "contaminant," 35 Ill. Admin. Code § 210.102, and because 35 Ill. Admin. Code § 201.141 is federal law, the Illinois Legislature has no power to unilaterally modify the Illinois SIP to make it inapplicable to greenhouse gases.[1]

If Illinois intended to adopt 415 ILCS 140/15 to modify the SIP-approved 35 Ill. Admin. Code § 201.141, to make it inapplicable to greenhouse gases, Illinois was required to do so by modifying the Illinois SIP through a revision approved by EPA. *General Motors*

[1] In fact, as explained below, the Illinois Legislature attempted no such thing.

Corp. v. United States, 496 U.S. 530, 540 (1990) (holding that the approved SIP controls until EPA approves a revision, even when a state has submitted a proposed revision); *Safe Air for Everyone v. United States EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) ("a state may not unilaterally alter the legal commitments of its SIP once EPA approves the plan… Thus, the SIP became *federal* law, not *state* law, once EPA approved it, and could not be changed unless and until EPA approved any change. Consequently, the state's interpretation of the regulations incorporated into the SIP, even if binding as a matter of state law, is not directly dispositive of the meaning of the SIP." (emphasis original)); *Sierra Club v. TVA*, 430 F.3d 1337, 1346 (11th Cir. Ala. 2005) ("If a state wants to add, delete, or otherwise modify any SIP provision, it must submit the proposed change to EPA for approval. See 40 C.F.R. § 52.1384 (explaining "the requirement of section 110(i) that the SIP can be modified only through the SIP revision process")."); *United States v. Ford Motor Co.*, 814 F.2d 1099 (6th Cir. 1987) (holding that a state cannot invalidate an approved SIP without EPA approval); *Friends of the Earth v. Carey*, 535 F.2d 165, 169 (2d Cir. 1976) ("[A] plan, once adopted by a state and approved by the EPA, becomes controlling and must be carried out by the state."); *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 399 F. Supp. 2d 726, 734 (E.D. La. 2005) (holding that the state could not "revise Louisiana's EPA-approved implementation plan by declaring that certain permit violations are not in fact permit violations without approval from the EPA"); *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1170 (D. Ariz. 2001) ("a state is without power to alter or repeal a SIP without EPA approval"); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1101 (W.D. Wis. 2001) (holding that the applicable SIP is the language of regulations as approved by EPA and that later

state law changes that were not approved as SIP revisions by EPA did not affect or alter the approved SIP); *United States v. General Dynamics Corp*., 755 F. Supp. 720, 723 (N.D. Tex. 1991) (holding that a defendant's emissions pursuant to and in compliance with a state-issued order were unlawful under the SIP and, therefore, the Clean Air Act because the state could not modify an applicable SIP without EPA's approval). Therefore, if the Illinois Legislature had attempted to modify 35 Ill. Admin. Code § 201.141 through adoption of 415 ILCS 140 (which it did not do as explained below), that attempted modification has no effect unless and until EPA approves a SIP revision. EPA has not done so and, therefore, IEPA's argument fails for this reason too.

C. The Text of The Illinois Statute Clearly Does Not Apply Retroactively to 35 Ill. Admin. Code § 201.141.

Lastly, the text of the state law that IEPA cites—415 ILCS 140/15—simply does not "prohibit[] IEPA from proposing 'any legally enforceable commitments related to the reduction of greenhouse gases'" through application of an § 201.141 to greenhouse gases, as IEPA argues. (IEPA Surreply at 6-7.) IEPA's selective quotations from the statute leaves out the operative language, which clearly makes the statue applicable only to promulgation of new regulations. Contrary to IEPA's implication, the "prohibition" in the statute actually states that "[e]ffective immediately, the Environmental Protection Agency and the Pollution Control Board shall not propose or adopt *any new rule* for the intended purpose of addressing the adverse effects of climate change which in whole or in part reduces emissions of greenhouse gases…" 415 ILCS 140/15(a) (emphasis added). The SIP provision at issue, however, was adopted on May 31, 1972, 37 Fed. Reg. 10862, more than

twenty-six years before 415 ILCS 140/15(a) was adopted on December 15, 1998. *See* 415 ILCS 140 (notes identifying source of statue as P.A. 90-797 and an effective date of December 15, 1998). Therefore, the statute's prohibition on proposing or adopting "new rule[s]" is inapplicable to the previously-adopted 35 Ill. Admin. Code § 201.141.

There is nothing in 415 ILCS 140 to prohibit *application* of the *existing* Illinois SIP to greenhouse gases. To the contrary, the statute provides that "[n]othing in this Section shall be construed to (i) limit or impede the authority of the Illinois Environmental Protection Agency… to … enforce rules and laws which implement the federal Clean Air Act…" 415 ILCS 140/15(b). Because the SIP implements the Clean Air Act, the statute expressly allows IEPA to implement it even if 415 ILCS 140/15(a) applied to existing rules. In short, even if the Illinois Legislature could have modified 35 Ill. Admin. Code § 201.141 without EPA approval of a SIP revision, it never did so because 415 ILCS 140 does not apply to previously-adopted SIP provisions.

Conclusion

For the foregoing reasons, 415 ILCS 140/15 is inapplicable to the issues in this case. The IEPA failed to ensure compliance with 35 Ill. Admin. Code § 201.141 prior to issuing the permit at issue and, therefore, review and remand is appropriate.

Respectfully submitted

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CERTIFICATE OF SERVICE OF PETITIONER'S NOTICE AND MOTION OF PETITIONER FOR LEAVE TO FILE REPLY

On March 10, 2010, I caused to be delivered a copy of the foregoing Sierra Club's Response to the Sur-Reply of the Illinois Environmental Protection Agency to:

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I declare that the foregoing is true to the best of my knowledge.

David C. Bender